

Editor's note: 93 I.D. 417; Appealed -- dismissed as moot, Civ.No. 86-F-2535 (D.Colo. June 30, 1988)

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL., PETITIONERS

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, RESPONDENT

WEST ELK COAL CO.,

INTERVENOR

STATE OF COLORADO,

INTERVENOR

IBLA 83-757

IBSMA 81-83

Decided November 18, 1986

Issue of appropriate relief for certain failures in the approval of permit to mine coal at the Mt. Gunnison No. 1 mine. CO 0021.

No relief appropriate, except to the extent petitioners may request a comment period on the sedimentation control plan for the loadout facility.

1. Surface Mining Control and Reclamation Act of 1977: Federal Lands: Cooperative Agreements--Surface Mining Control and Reclamation Act of 1977: Federal Lands: Mining Plan--Surface Mining Control and Reclamation Act of 1977: Federal Lands: Permits--Surface Mining Control and Reclamation Act of 1977: Permits: Reclamation Plan

Where one files a permit application package to mine coal on Federal lands in a state in which the state and the Secretary of the Interior have entered into a cooperative agreement in accordance with 30 U.S.C. § 1273(c) (1982), the state is responsible for approving or disapproving the mining permit, but the Secretary retains authority to approve or disapprove the operation and reclamation plan component

of the application. A cooperative agreement does not vest the state with complete control over mining on Federal lands.

94 IBLA 269

2. Board of Land Appeals--Surface Mining Control and Reclamation Act of 1977: Permits: Approval

The Board of Land Appeals is not bound by the permitting scheme established by Congress in fashioning relief in an administrative review proceeding in which issuance of a permit to mine has been challenged, where the party seeking review has actively waived or acquiesced to a waiver of the review deadlines in 30 U.S.C. § 1264(c) (1982).

3. Surface Mining Control and Reclamation Act of 1977: Federal Lands: Cooperative Agreement--Surface Mining Control and Reclamation Act of 1977: Hydrologic Protection System: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Approval

Under 30 U.S.C. § 1260(b)(3) (1982), in reviewing a permit or permit revision application the regulatory authority is required to assess the probable cumulative impact of all anticipated mining on the hydrologic balance. Where the state has the primary responsibility under a cooperative agreement for purposes of providing notice and opportunity for a hearing on the review and approval of a permit or permit revision application, it prepares the probable cumulative impact assessment and solicits public comment.

4. Surface Mining Control and Reclamation Act of 1977: Federal Lands: Cooperative Agreements--Surface Mining Control and Reclamation Act of 1977: Hydrologic Protection System: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Approval

Where the Board of Land Appeals finds on the basis of a petition for review of the approval by OSM of a 1981 permit to mine that OSM failed to prepare a proper probable cumulative impact assessment before issuing the permit, no relief is appropriate where, under a cooperative agreement entered into after the issuance of the permit, the permittee seeks two revisions of its permit for which the state prepares new probable cumulative impact assessments, invites comment thereon, and the petitioners fail to register any objections. OSM's failure will be considered to have been cured when no objection to the new assessments prepared by the state was raised by petitioners.

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OPINION BY ADMINISTRATIVE JUDGE HARRIS

On September 27, 1985, the Board issued its decision in Natural Resources Defense Council, Inc. v. Office of Surface Mining Reclamation and Enforcement, 89 IBLA 1, 92 I.D. 389 (1985). 1/ The Board held that Natural Resources Defense Council, Inc. (NRDC), and various individual petitioners had established that in approving Federal permit CO 0021 to mine coal at the Mt. Gunnison No. 1 mine:

(a) OSM failed to assess the probable cumulative impacts of all anticipated mining in the area on the hydrologic balance;

(b) OSM failed to make its alluvial valley floor determination prior to permit issuance and stipulations #3 and #5 were added to the permit to elicit information required before permit approval;

(c) OSM failed to require plans for the loadout site sedimentation pond prior to permit approval and stipulation #23 was added to the permit to satisfy that requirement.

1/ On Nov. 12, 1985, West Elk Coal Company, Inc. (West Elk), filed a motion seeking to substitute itself for Atlantic Richfield Company as Intervenor in this case. By order dated Nov. 22, 1985, the Board granted the motion.

89 IBLA at 71, 92 I.D. at 423. The Board, in accordance with the understanding of the parties, extended the opportunity to file briefs addressing the issue of the appropriate relief for the above-stated failures. NRDC et al., West Elk Coal Company (West Elk), the State of Colorado (State), and the Office of Surface Mining Reclamation and Enforcement (OSM) filed initial briefs and replies. 2/

Generally, the relief sought by the parties may be summarized as follows. NRDC et al. request that the Board deny the permit in part because of the identified deficiencies and vacate the permit in part. NRDC et al. would have the Board direct in an order that coal extraction cease at the Mt. Gunnison No. 1 mine within 30 days of the date of the order; that within 15 days of the date of the order West Elk submit a plan to OSM and the Colorado Mined Land Reclamation Division (CMLRD) for ceasing extraction while continuing to comply with all applicable environmental performance standards during the period extraction is halted; and that within 15 days of submission of the plan, after seeking NRDC et al.'s views, OSM be required to modify or approve the plan. NRDC et al. also urge that the Board remand the case to OSM for proceedings to address the deficiencies identified by the Board. NRDC et al. suggest the Board direct OSM to offer at least a 30-day comment period

2/ West Elk represents in its reply brief that the individual petitioners did not file a brief and that it was informed by counsel for the individual petitioners that counsel for NRDC et al. would be substituted as counsel for the individual petitioners (West Elk Reply at 4). West Elk asserts that record statements of certain individual petitioners are inconsistent with the relief sought by counsel for NRDC et al. The Board has received no specific request for substitution. However, in the briefs filed in response to the opportunity extended by the Board, L. Thomas Galloway certifies he is "Counsel for NRDC et al." (Emphasis in original.)

following preparation by OSM of a probable cumulative impact (PCI) assessment and resubmission by West Elk of materials to replace the improper stipulations. 3/ Any person who is or may be adversely affected should be allowed to request an informal conference on the issues raised, NRDC et al. argue. Following any informal conference, NRDC et al. assert, OSM should be required to approve or disapprove that portion of the permit vacated by the Board.

Both West Elk and the State believe no relief is necessary because, they allege, all the deficiencies have been remedied by subsequent action. The subsequent action is identified as two permit revision and mine plan modification approvals by CMLRD and the Department of the Interior, respectively, in 1985 for the Mt. Gunnison No. 1 mine. 4/ West Elk also believes

3/ Section 510(b)(3) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1260(b)(3) (1982), requires the regulatory authority to find in writing that "the assessment of the probable cumulative impact of all anticipated mining in the area on the hydrologic balance" has been made and the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. Throughout our earlier decision we referred to this assessment as the PCI (probable cumulative impact) assessment. The parties variously refer to it in their briefs as the "CHIA" (cumulative hydrologic impact assessment) (NRDC et al.), "CHIS" (cumulative hydrologic impact study) (the State), "PCIA" (probable cumulative impact assessment) (OSM), and "PCI" assessment (West Elk). We note the regulations use the acronym adopted by NRDC et al. See 30 CFR 784.14(f). However, for purposes of continuity with our previous decision we will continue to refer to the section 510(b)(3) assessment as the PCI assessment.

4/ In addition, West Elk points out that subsequent to issuance of the 1981 permit challenged by NRDC et al. in this case, CMLRD issued five permits for mines in the North Fork Valley of the Gunnison River for which OSM also issued mining plan approvals. West Elk states those mines are: (1) Bear Mines Nos. 1, 2, and 3 (one permit), (2) Orchard Valley Mine, (3) Blue Ribbon Mine, (4) Hawk's Nest Mine, and (5) Somerset Mine. Also, in addition to the two Mt. Gunnison No. 1 mine permit revisions, West Elk states CMLRD approved two permit revisions for the Orchard Valley Mine and one for the Bear Mines Nos. 1, 2, and 3 and OSM approved mining plan modifications for the Orchard Valley Mine. The mining plan modification for the Bear Mines is

the Board cannot grant any relief and that the action should be dismissed as moot because authority over the Mt. Gunnison No. 1 mine rests exclusively with the State under the September 27, 1982, cooperative agreement between the State and the Department.

OSM contends no relief is required for the failure to do the PCI assessment or for the failure to make the alluvial valley floor (AVF) determination because the subsequent permit revision and mine plan modification approvals have cured the deficiencies. OSM states, however, the deficiency which resulted in the loadout site sedimentation pond plan stipulation, although substantively cured by subsequent action, technically still exists because CMLRD did not allow public comment on the approval of the plan. OSM concludes the only necessary relief is an order from the Board to CMLRD directing it to seek public review and comment on the sedimentation control plan and to treat the matter as a permit revision made pursuant to the cooperative agreement.

[1] We will first consider West Elk's contention that the Board no longer has jurisdiction over the Mt. Gunnison No. 1 mine and that the Federal permit upon which this case is premised is moot due to the cooperative agreement. West Elk states that at the time of original permit issuance (July 12,

fn. 4 (continued)

pending, West Elk states. West Elk asserts that in connection with these approvals PCI assessments were prepared and the area covered by the assessments is the same as that for the Mt. Gunnison No. 1 mine. NRDC et al. does not dispute this claim nor is there any evidence in this record that NRDC et al. registered objections to any of the PCI assessments.

1981) no cooperative agreement existed and both a Federal and State permit were necessary. Following the September 27, 1982, cooperative agreement, jurisdiction and regulatory authority over surface coal mining and reclamation operations on Federal lands within the State was transferred to the State, West Elk asserts. Only a State permit, West Elk argues, is now necessary for the mine. West Elk does admit, however, that OSM retains jurisdiction over mine plan approval for Federal lands. West Elk asserts that permit challenges, when the State of Colorado is the regulatory authority, must be directed to the Colorado Mined Lands Reclamation Board (CMLRB). West Elk requests the Board to dismiss this action or, in the alternative, to transfer it to the CMLRB which, it asserts, has jurisdiction of the Mt. Gunnison No. 1 mine permit.

We reject West Elk's argument that the Board no longer has jurisdiction in this case. West Elk's argument is based on the cooperative agreement. However, that agreement was in existence long before our initial decision in this case. West Elk did not come forward to argue that we should, prior to that decision, transfer jurisdiction to CMLRB on the basis of the agreement. Likewise, we cannot accept West Elk's assertion that "only a state permit is necessary to mine" (West Elk Brief at 7-9) for the following reasons.

The distinction between permit approval by the State and mine plan approval by the Secretary in cases involving Federal lands was explored by Judge Flannery in In re Permanent Surface Mining Regulation Litigation, No. 79-1144 (D.D.C. July 6, 1984) (Round I), 14 ELR 20617 (1984). Therein, in

response to a challenge to the definition of "mining plan" in Departmental regulation 30 CFR 740.5 (1983), the court analyzed the meaning of the following language in section 523(c) of SMCRA, 30 U.S.C. § 1273(c) (1982):

Nothing in this subsection shall be construed as authorizing the Secretary to delegate to the States his duty to approve mining plans on Federal lands, to designate certain Federal lands as unsuitable for surface coal mining pursuant to section 1272 of this title, or to regulate other activities taking place on Federal lands.

The court stated that the term "mining plan," as used in that section, refers to a plan required by the Mineral Leasing Act, 30 U.S.C. §§ 202a(2) and 207(c) (1982), and while "mining plan" is not defined in that Act, section 508 of SMCRA, 30 U.S.C. § 1258 (1982) (setting out reclamation plan requirements), does provide some guidance as to its meaning. The court found:

[t]he regulation defining mining plan [30 CFR 740.5 (1983)] cannot ignore the clarification provided by SMCRA. The admonition against delegation contained in section 523(c) means that the Secretary must render a decision on the operation and reclamation portions of the permit application. [Footnote omitted.]

14 ELR at 20619. The court, thus, remanded the regulation defining "mining plan" to the Department for repromulgation because the regulation had reduced the Secretary's review to "nothing more than review of a reclamation schedule." 14 ELR at 20619. The court clearly explained that where Federal land is involved, one seeking to mine must receive both mining permit approval from the State and mining plan approval from the Secretary.

The cooperative agreement itself cannot be read as vesting complete control over mining on Federal lands with the State of Colorado. Article VI, Paragraph 8, of the agreement provides in relevant part:

8. The MLRD shall assume primary responsibility pursuant to sections 510(a) and 523(c) of the Act for the analysis, review, and approval of the permit application or application for a permit revision or renewal according to the standards of the approved Program. The Director [OSM] shall assist the MLRD in the analysis of the permit application or application for a permit revision or renewal and coordinate with the other appropriate Federal agencies as specified by the Secretary according to the procedures set forth in Appendix B. The Department shall concurrently carry out its responsibilities which cannot be delegated to the State * * * so as, to the maximum extent possible, not to duplicate the responsibilities of the State as set forth in this Agreement and the Program. The Secretary shall consider the information submitted in the permit application package and, when appropriate, make the decisions required by the Act, MLA, NEPA and other public laws as described above.

30 CFR 906.30. Thus, while the State has primary responsibility, that responsibility is not exclusive, and the Secretary must continue to make the decisions required of him by law. As stated in Article III, Paragraph 4, of the cooperative agreement, "Orders and decisions issued by MLRD in accordance with the State Program that are appealable, shall be appealable to the State reviewing authority. Orders and decisions issued by the Department that are appealable, shall be appealed to the Department of the Interior's Office of Hearings and Appeals." We are not persuaded that the cooperative agreement has divested the Board of jurisdiction over this case.

We now turn to NRDC et al.'s contentions. Central to NRDC et al.'s arguments on the issue of relief is their position that, having found error

in the permitting process, the Board is bound by the permitting scheme established by Congress in the Act in fashioning relief. Deviation from that system, NRDC et al. argue, will be a signal to state regulatory authorities to issue permits without requiring the necessary information and making the required findings.

Under the Act a person cannot undertake surface coal mining operations on lands on which such operations are regulated by a state without obtaining a permit issued by the appropriate regulatory authority. 30 U.S.C. § 1252(a) (1982). Section 510(b) of the Act provides that no permit or revision application shall be approved unless the application affirmatively demonstrates and the regulatory authority finds in writing that all necessary requirements of the Act have been met. 30 U.S.C. § 1260(b) (1982). Section 514 of the Act governs the permit application approval or disapproval process. 30 U.S.C. § 1264 (1982). The application may be approved or disapproved in whole or in part. 30 U.S.C. § 1264(b) (1982). If the application is approved, the permit shall issue. 30 U.S.C. § 1264(c) (1982). If the application is disapproved, specific reasons for disapproval must be set forth. Id. Administrative challenges to approval or denial are regulated by 30 U.S.C. § 1264(c) (1982), which establishes rigorous time limits for requesting a hearing ("[w]ithin thirty days after the applicant is notified of the final decision"), for holding the hearing ("[t]he regulatory authority shall hold a hearing within thirty days of such request"), and for issuance of a decision ("[w]ithin thirty days after the hearing the regulatory authority shall

issue * * * the written decision * * * granting or denying the permit in whole or in part and stating the reasons therefor"). 5/

NRDC et al. argue that the Board is bound by the same remedies in its review as the regulatory authority is in review of the permit application. If the Board finds any deficiency in the approval and issuance of the permit, NRDC et al. contend, the permit must be denied in part, as the permit application would be disapproved in part under 30 U.S.C. § 1264(c) (1982), and the improper issuance by the regulatory authority must be vacated, and mining must cease. NRDC et al. charge the "Board's authority to grant relief is founded on, and restricted to, its statutory grant of authority set forth in Section 514(c)" (NRDC et al. Brief at 13). NRDC et al. acknowledge that not allowing coal extraction during re-examination of the permit application will have "significant consequences" for West Elk, but it argues the permit issued improperly in the first instance and to allow mining to continue where the permit has issued improperly would "defeat the clear Congressional intent not to allow mining to go forward where the required showings had not been made" (NRDC et al. Brief at 18).

In response to NRDC et al.'s arguments West Elk asserts the Board should examine the objectives of relief with attention to the policies of

5/ On Oct. 2, 1986, the Office of Hearings and Appeals proposed procedural regulations governing, inter alia, requests of review of the approval or disapproval of an application for a permit to mine. 51 FR 35248. Under 43 CFR 4.1365 of those proposed rules styled "Status of permit pending administrative review," the filing of a request for review of approval of an application "shall not suspend the permit pending completion of administrative review." 51 FR 35253 (Oct. 2, 1986).

the Act. West Elk states the central purpose of SMCRA is protection of the environment. It alleges NRDC et al. view this case as a method to "establish the standards for relief in permit proceedings nationwide," quoting NRDC et al. Brief at page 2. West Elk asserts this is a controversy limited to its facts and the Board should acknowledge that all deficiencies have been remedied and no environmental damage, "as prophesied by NRDC," has taken place (West Elk Answer Brief at 8). West Elk charges NRDC et al. want the entire burden of OSM errors to be borne by West Elk even though there is no allegation of environmental damage or harm resulting from the identified deficiencies. West Elk urges that the Board should examine various factors in fashioning any relief, including the economic impact, whether the environmental objectives of SMCRA are being fulfilled, and whether the relief will provide any environmental benefit. An administrative agency has wide discretion in formation of appropriate relief in a case before it, West Elk argues, citing Atlantic Refining Co. v. Federal Trade Commission, 381 U.S. 357, reh. denied, 382 U.S. 873 (1965), and Federal Trade Commission v. Ruberoid Co., 343 U.S. 470 (1952). West Elk contends under the present circumstances there is no justification for closing the mine and that even if a deficiency remains, public comment can be allowed while mining continues. Finally, West Elk asserts that the Board, in accordance with 5 U.S.C. § 705 (1982), has the authority to postpone the effective date of action taken by it, pending judicial review.

The issue presented is whether the remedies available to the Board are limited by section 514(c) of the Act, 30 U.S.C. § 1264(c) (1982). NRDC et

al. state that remedies are controlled by the intent of Congress and in this case the Board must look to congressional intent in sections 510 and 514 of the Act (NRDC et al. Brief at 20). They further state other environmental statutes are not controlling because of their radical differences in permitting procedures.

[2] We will commence our analysis of this issue by turning to the language of SMCRA. Review of section 514(c) reveals that Congress was interested in swift administrative review of permit application decisions, regardless of whether applications were approved or disapproved. The time limits set for hearing and decision are among the most stringent imposed in any environmental statute. In an effort to show how serious it considered these deadlines to be, Congress provided at section 514(f), 30 U.S.C. § 1264(f) (1982), that

[a]ny applicant or any person with an interest which is or may be adversely affected who has participated in the administrative proceedings as an objector, and who is aggrieved by the decision of the regulatory authority, or if the regulatory authority fails to act within the time limits specified in this chapter shall have the right to appeal in accordance with section 1276 of this title. [Emphasis added.]

30 U.S.C. § 1276 (1982) sets forth the procedures for seeking judicial review. In addition, at section 514(d) Congress provided the authority for granting temporary relief in a permit application review proceeding, thus providing a mechanism for even swifter review of a temporary nature.

It appears the purpose of the review deadlines in section 514 was to benefit the permit applicant, i.e., to provide it with expeditious resolution of the status of its permit application or permit. In fact, in S. 7, the Senate version of the Act, and H.R. 2, the House version of the Act, this section (designated therein as sections 414 and 514, respectively) provided for review with the 30-day deadlines, only if the application were denied; approval of the permit was not subject to administrative review. S. Rep. No. 128, 95th Cong., 1st Sess. 22-23, 81 (1977); H. Rep. No. 218, 95th Cong., 1st Sess. 28 (1977). The present review system was added by the conference committee without relevant comment. See H. Rep. No. 493, 95th Cong., 1st Sess. 106-07 (1977).

Under section 514(c), 30 U.S.C. § 1264(c) (1982), if the approval of a permit were challenged by a "person with an interest which is or may be adversely affected," presumably the intent of Congress was that such a challenge be resolved expeditiously, such that the permittee would not incur a lengthy delay in its operations. On the other hand, if the application were disapproved, presumably Congress intended that the applicant could seek speedy review of that denial and possibly take remedial action to secure the permit as soon as possible.

In this case NRDC et al. sought review of the July 1981 issuance by OSM of the Federal permit to mine at the Mt. Gunnison No. 1 mine. The Department did not adhere to the section 514(c) deadlines for hearing and decision, nor was it pressed to do so by the parties. No party sought judicial review because of such failure, and 5 years later there still has not

been a final administrative resolution of the controversy. Yet, NRDC et al. still assert the Board has no choice but to deny the permit in part and vacate issuance of the permit in part and order the cessation of mining for any of the identified deficiencies until they all are procedurally and substantively corrected.

NRDC et al. has urged the Board to look to the intent of Congress in passing the Act. We have done so, and we cannot believe Congress intended the result urged by NRDC et al. under the circumstances of this case. Where the party challenging the approval of a permit has actively waived or acquiesced in waiver of the review deadlines in section 514(c), we believe, where deficiencies are identified, the Board is not restricted automatically to denying the permit in whole or in part, which NRDC et al. assert leads to only one result--cessation of mining. ^{6/} This is not to say the Board could not deny a permit in whole or in part in such a case and order the vacation or partial vacation of the permit. However, under circumstances such as those existing in this case, the Board is not bound, as NRDC et al. claim, to the same remedies as the regulatory authority in reviewing a permit application. The Board may fashion relief which is appropriate in this case.

West Elk and the State argue no relief is necessary because subsequent permit revisions have rectified the failures of OSM identified by the Board. OSM joins this contention as to the PCI assessment and AVF

^{6/} In their brief as page 13, NRDC et al. state: "Once the Board denies the permit in part, the Act is crystal clear that mining cannot proceed."

deficiencies. West Elk claims the issue of relief is now moot. We will examine these arguments as they relate to each deficiency. First, the PCI assessment.

Probable Cumulative Impact Assessment

The facts are undisputed that West Elk sought two permit revisions for the Mt. Gunnison No. 1 mine and in 1985 the State and OSM approved those revisions as to the permit and mine plan, respectively. ^{7/} As part of its review process the State in each case undertook a PCI assessment. The State allowed public comment on its proposals to approve the revisions, which NRDC et al. admit (OSM Brief at 3, Exh. A; NRDC et al. Brief at 21). NRDC et al. raised no objection to those determinations. They assert they believe "the state regulatory authority has a closed mind concerning our contentions and acts as an adversary, not as an impartial regulatory authority" (NRDC et al. Brief at 21-22). NRDC et al. complain that mine plan approvals by OSM occurred without the opportunity for public comment. With regard to the approval for an additional 320 acres, NRDC et al. allege, if they had had the opportunity, they

^{7/} The two permit revisions are known as the "320 acre" revision and the "1630 acre" revision. OSM points out the second revision application originally related to 1,630 acres. This was subsequently modified by adding 135 acres; therefore, the 1,630-acre permit revision is actually for 1,765 acres (OSM Brief at 3). The State proposed approval of the 320-acre permit revision in June 1985, offering a 30-day comment period. No comments were filed and approval became final on July 27, 1985. The Assistant Secretary for Land and Minerals Management signed the mining plan modification approval on Aug. 16, 1985. The notice for proposed approval of the 1,630-acre permit revision was published on Aug. 26, 1985, announcing a 30-day comment period. The State's final approval came on Sept. 26, 1985, and the Assistant Secretary's approval for the Department on Sept. 27, 1985.

would have shown OSM the major failures in what purports to be the CHIA [cumulative hydrologic impact assessment] and PHC [probable hydrologic consequences determination], including (1) failures to consider and limit life of the mine impacts on the hydrologic balance, especially in the key area of dispute, the Minnesota Creek Basin; and (2) failures to include all anticipated mining in the analysis, to mention only two of many deficiencies. [Footnote omitted.]

(NRDC et al. Brief at 22). NRDC et al. argue they must be allowed to present their views to OSM (or to the Board) on why the two PCI assessments prepared by the State and relied upon by OSM did not cure the deficiencies found by the Board in the original assessment. In essence, NRDC et al. contend they were not required to challenge the sufficiency of the PCI assessments before the State because they were relying on their opportunity to contest that determination in OSM's mining plan review process, but OSM never provided that opportunity. NRDC et al. further argue

there is no question but that all the deficiencies found by the Board in the initial permit approval fall within the scope of the Section 508 non-delegable duty. As far as the CHIA is concerned, the finding required by Section 508(a)[13] that the Secretary determine whether the mining operation will assure the protection of, inter alia, the quality and quantity of surface and ground water systems must be based on the PHC and CHIA hydrologic analysis. Thus, the Secretary must ensure that an adequate PHC and CHIA is done in order to make the hydrologic findings required by Section 508.

In fact, the Secretary has accepted this rather obvious construction of the statute, as he routinely reviews and approves the CHIA and PHC analysis in order to perform his Section 508 duty, as he did, however badly, for the permit and mine plan amendments in the instant case.

(NRDC et al. Reply at 7).

The permit challenged in this case was the Federal permit issued in 1981 prior to the execution of the cooperative agreement by the State and OSM in September 1982. Under the cooperative agreement set forth in 30 CFR 906.30, the permit application package or application for permit revision or renewal is submitted to both the State and OSM. See Article VI, Paragraph 7. According to the cooperative agreement, the State assumes primary responsibility pursuant to sections 510(a) and 523(c) of the Act for analysis, review, and approval of the application. See Article VI, Paragraph 8. The Secretary retains the power to approve or disapprove the operation and reclamation plan component of the permit application. See Article VI, Paragraph 8; In re Permanent Surface Mining Regulation Litigation (Round I), supra. Importantly, the cooperative agreement provides: "To the fullest extent allowed by State and Federal law, the Director [OSM] and MLRD shall cooperate so that duplication will be eliminated in conducting the review and analysis of the permit application package or application of a permit revision or renewal." Article VI, Paragraph 12.

The 1985 permit revision and mining plan approvals followed analysis and review by the State and OSM. In accordance with the State's primary role, it undertook compilation of the PCI assessments. Prior to the State's approval of each permit revision, it provided the opportunity for public comment on its proposed approval, including comment on its PCI assessment. None was forthcoming from NRDC et al. NRDC et al. now claim they did not do so because of their perception of the State's attitude toward them and their belief that they were relying on their Federal rights.

The question presented is whether NRDC et al. waived their right to object to the sufficiency of the PCI assessments by failing to pursue those objections at the State level. NRDC et al. argue that mining plan approval under section 508(a) of the Act, 30 U.S.C. § 1258 (1982), necessarily entails ensuring whether or not the PCI assessment is adequate and, if OSM had provided for public participation, they would have participated. Not commenting to the State, they assert, should not defeat their Federal rights.

[3] The purpose of the cooperative agreement involved in this case is to, as set forth at Article I, Paragraph 2: "(a) foster Federal-State cooperation in the regulation of surface coal mining; (b) eliminate intergovernmental overlap and duplication; and (c) provide uniform and effective application of the Program on all non-Indian lands in Colorado, in accordance with the Act and the Program." 30 CFR 906.30. The attempt by the Department to delegate to the states the Secretary's duty under section 523(c) to approve mining plans on Federal lands was overturned by Judge Flannery in his 1984 In re Permanent Surface Mining Litigation (Round I) opinion, supra. Therefore, at the time of review of the permit revision applications in 1985 the State and OSM were operating under the cooperative agreement and Judge Flannery's opinion in performing their respective review functions.

The record indicates, and there is no dispute, the State provided notice to the public of its proposed approval of the permit revisions and invited public comment. It does not appear the State permit revision review

and OSM's mining plan review operations were conducted independently. ^{8/} The process involved the coordination contemplated by the cooperative agreement to avoid duplication of effort. See 30 CFR 906.30, Appendix B. OSM's role in mining plan review and approval is governed by the regulations at 30 CFR Part 746. ^{9/} Section 746.1 of 30 CFR states Part 746 "provides the process and requirements for the review and approval, disapproval or conditional approval of mining plans on lands containing leased Federal coal." Under the regulations OSM is required to prepare and submit to the Secretary a decision document recommending approval, disapproval, or conditional approval of the mining plan. 30 CFR 746.13. The recommendation is required to be based, at a minimum, upon:

(a) The permit application package, including the resource recovery and protection plan;

(b) Information prepared in compliance with the National Environmental Policy Act of 1969, 42 U.S.C. 4321 et seq.;

(c) Documentation assuring compliance with the applicable requirements of other Federal laws, regulations and executive orders other than the Act;

^{8/} In a letter to OSM dated Aug. 27, 1985, CMLRD stated:

"Thank you for your comments on the Division's Findings of Compliance Document for the Mt. Gunnison 1765 Acre Permit Revision. Numerous written and oral comments were forwarded by OSM in our meeting of August 13, 1985 and subsequent telephone conversations on August 13th and August 14th. Formal written comments were received from OSM on August 21, 1985. The Division responded to OSM concerns via a revised Findings Document on August 23, 1985. Final comments were raised by OSM on August 19, 1985 in a meeting with Rick Lawton of OSM. The Division made final changes to the document that day so that a proposed decision was available by the afternoon of August 26, 1985. It is our understanding that the final decision document adequately addresses all of OSM's concerns."

(OSM Brief, Exh. A).

^{9/} The Part 746 regulations were published in final on Feb. 16, 1983, at 48 FR 6912, 6941, to be effective Mar. 18, 1983.

(d) Comments and recommendations or concurrence of other Federal agencies, as applicable, and the public;

(e) The findings and recommendations of the Bureau of Land Management with respect to the resource recovery and protection plan and other requirements of the lease and the Mineral Leasing Act;

(f) The findings and recommendations of the regulatory authority with respect to the permit application and the State program; and

(g) The findings and recommendations of OSM with respect to the additional requirements of this subchapter.

30 CFR 746.13.

While 30 CFR 746.13(d) provides that the recommendation is to be based upon comments from the public, there is no provision in 30 CFR Part 746 pertaining to a public comment procedure. The comments for the Mt. Gunnison No. 1 mine permit revisions were solicited at the State level in accordance with Article VI, Paragraph 8, of the cooperative agreement. Thus, under the cooperative agreement the State, as the regulatory authority, undertook a PCI assessment. The time for comment on that assessment was when comments were solicited by the State. 10/

NRDC et al. charge the Secretary must make findings under section 508(a), 30 U.S.C. § 1258(a) (1982), inter alia, that the mining operation

10/ Since the State was required under the cooperative agreement and the Act to perform the PCI assessment, it is logical that it would receive public comment thereon. However, where mining plan modification review involves findings required in the first instance by OSM, 30 CFR 746.13(d) indicates a public comment period would be necessary at the Federal level. None was provided for the two 1985 Mt. Gunnison No. 1 mining plan modification approvals.

will assure the protection of the quality and quantity of surface and ground water systems. Section 508(a)(13) provides:

Sec. 508. (a) Each reclamation plan submitted as part of a permit application pursuant to any approved State program or a Federal program under the provisions of this Act shall include, in the degree of detail necessary to demonstrate that reclamation required by the State or Federal program can be accomplished, a statement of:

* * * * *

(13) a detailed description of the measures to be taken during the mining and reclamation process to assure the protection of:

(A) the quality of surface and ground water systems, both on- and off-site, from adverse effects of the mining and reclamation process;

(B) the rights of present users to such water; and

(C) the quantity of surface and ground water systems, both on- and off-site, from adverse effects of the mining and reclamation process or to provide alternative sources of water where such protection of quantity cannot be assured;

30 U.S.C. § 1258(a)(13) (1982). NRDC et al. contend that the Secretary has accepted "this rather obvious construction" of 30 U.S.C. § 1258 (1982) "as he routinely reviews and approves the CHIA and PHC analysis in order to perform his Section 508 duty" (NRDC et al. Reply Brief at 7). The fact that the Secretary accepted the PCI assessments made by the State in review of the permit revision applications does not mean he was doing so pursuant to any section 508 obligation. That section does not require specific findings by the Secretary, as NRDC et al. allege. It merely describes reclamation plan informational requirements with which an applicant must comply as part of

the permit application process. This is information which in the first instance goes to the completeness of a permit application package. ^{11/} In that regard section 508(a), 30 U.S.C. § 1258(a) (1982), should be compared with section 510(b), 30 U.S.C. § 1260(b) (1982), which requires written findings by the regulatory authority as part of the permit approval process. In addition, the mining plan approval regulations provide that the Secretary's decision on mining plan approval will be based on, among other things, the State's findings on the permit application. See 30 CFR 746.13(f). Neither the Act nor the regulations require the Secretary, in a situation involving a cooperative agreement, to make the PCI assessment required of the regulatory authority. Certainly nothing would preclude the Secretary from denying a mining plan where he was not satisfied with the PCI assessment; however, under a cooperative agreement the State and OSM presumably would work together to develop a PCI assessment satisfactory to both.

[4] If any person was dissatisfied with the PCI assessment, the proper forum for complaint was the CMLRB, as set forth in the State's public comment notification. See OSM Brief, Exh. A. The fact that NRDC et al. may have been apprehensive about proceeding in a forum in which it believed it had

^{11/} "Permit application package" is defined in the regulations at 30 CFR 740.5(a) as

"a proposal to conduct surface coal mining and reclamation operations on Federal lands, including an application for a permit, permit revision, or permit renewal, all the information required by the Act, this subchapter, the applicable State program, any applicable cooperative agreement and all of the applicable laws and regulations including, with respect to leased Federal coal, the Mineral Leasing Act and its implementing regulations." The data presented in the permit application package should be sufficient for the permit application and the mining plan. See In re Permanent Surface Mining Regulation Litigation (Round I), 14 ELR at 20619, n.2.

little chance to prevail is not dispositive of the question whether it was afforded an opportunity to make its concerns known. Allowing the opportunity to comment on the PCI assessment at the Federal level, after that opportunity had been provided by the State, as regulatory authority under the cooperative agreement, would be duplicative. As previously stated, the purpose of a cooperative agreement is to avoid such duplication.

We cannot find that NRDC et al. were denied due process, as they allege. They had the opportunity to challenge the PCI assessment for both permit revisions at the State level. They chose not to do so, perhaps in the belief that they would have another opportunity to do so at the Federal level. ^{12/} The fact that such an opportunity did not materialize does not mean, as NRDC et al. argue, they "had no chance to present [their] objections to the subsequent hydrologic analysis" (NRDC et al. Reply Brief at 8). They had the chance and waived it by failing to participate.

NRDC et al. also attack the proposition that subsequent action by the State cured the deficiency identified by the Board by arguing that "the Secretary in approving the mine plan amendments for the Mt. Gunnison mine explicitly noted that his action did not affect in any way the ongoing litigation in the instant case" (NRDC et al. Reply Brief at 8). Special Condition 6, included in the mining plan modification for the "1,630 acre" permit

^{12/} Counsel for NRDC et al. represents, however, that OSM was queried "as to the opportunity for public comment and [he] was told there was no opportunity to comment or otherwise participate" (NRDC et al. Reply Brief at 7). Counsel does not disclose the date on which such inquiry was made.

revision, states: "This approval does not affect the outcome of the challenge to permit issued by OSM in 1981, now pending before Interior Board of Land Appeals. If any additional conditions are required by that decision this approval may be modified accordingly." The Assistant Secretary for Land and Minerals Management signed this mining plan modification approval on September 27, 1985. ^{13/}

NRDC et al. contend the action by the Assistant Secretary preserved the right of the Board to provide appropriate relief in this case. NRDC et al. charge:

NRDC et al. would note that it would be Kafkasque [sic] and grotesquely unfair, for the Board to hold that the federal mine plan amendments decision in which NRDC et al. (and the public) had no way to participate constituted the forum in which NRDC et al. should have obtained relief. As a matter of fundamental due process, NRDC et al. is entitled to a fair chance to present its views that no appropriate CHIA has ever been done for the Mt. Gunnison site and the Board should so hold.

(NRDC et al. Reply Brief at 9-10).

First, we must note that a decision made by an Assistant Secretary of the Department is not subject to appeal to this Board under the procedures prescribed in 43 CFR Part 4, and the Board has no jurisdiction in such a matter. Blue Star, Inc., 41 IBLA 333, 335 (1979). Thus, the Board would

^{13/} The earlier approval for the 320-acre permit revision, which was signed by the Assistant Secretary for Land and Minerals Management on Aug. 16, 1985, contained no such condition.

have had no authority to entertain direct appeals from the Assistant Secretary's August and September 1985 mining plan modification approvals, and none was filed.

The Board is left, however, to determine the impact of those approvals, if any, on the present case. With regard to the PCI assessment for the 1981 permit, the Board found it lacking. In reviewing the "320 acre" permit revision, the State conducted a new PCI assessment. That assessment, as part of the State's documents supporting its permit revision approval, was incorporated by the Department in its mining plan decision document signed by the Assistant Secretary. See State's Brief, Exh. B. As noted, supra, at note 11, the Assistant Secretary did not include special condition 6 in his "320 acre" approval. We do not believe the existence of the special condition, however, even if it were in both approvals, guaranteed NRDC et al. any particular type of relief in this case. The approval containing the condition was signed on the same date our first decision in this case was issued, September 27, 1985. The Assistant Secretary, therefore, was unaware of the deficiencies which were identified in the Board's decision. It is clear the Assistant Secretary intended that his approval should not prejudice the pending case, and he allowed that any conditions imposed by the Board would be incorporated into his approval. There is no indication he intended unilaterally to modify responsibilities under the cooperative agreement.

Thus, the Assistant Secretary's conditional approval did not preclude Board action on the issues raised in this case, but our review reveals

that further action by this Board in the form of relief for the original PCI assessment deficiency is not warranted because the State has performed new PCI assessments with which NRDC et al. did not take issue.

NRDC et al. assert they have a right to a Federal determination on the PCI assessment issue. The basis for any right they had, however, was the 1981 permit issued by OSM. The 1982 cooperative agreement changed the responsibilities of the parties to that agreement. The Board in its September 27, 1985, decision made its determination on the basis of that 1981 permit and found OSM failed in its PCI assessment duties. NRDC et al. would have us remand the case to OSM for a new PCI assessment.

NRDC et al. argue:

Upon remand, OSM may, if it so chooses, rely upon the subsequent hydrologic analysis performed to cure the deficiencies found by the Board. It can also choose, if it is wise, to perform a more adequate analysis. However, NRDC et al. should be permitted an opportunity to prove to OSM, and on appeal to the Board, that the new CHIA upon which the permit and mine plan approval rests is inadequate.

(NRDC et al. Reply Brief at 12). Clearly, this would be a viable option in the absence of the cooperative agreement; however, this Board is not at liberty to ignore that document which represents the Secretary's determination on how surface mining regulatory responsibilities will be shared between the State and the Department. Under the Act the regulatory authority is to prepare the PCI assessment. See 30 U.S.C. § 1260(b)(3) (1982). The State is the regulatory authority under the agreement. What NRDC et al. ignore

is that OSM no longer has the responsibility to do the PCI assessment for the Mt. Gunnison No. 1 mine. Assuming no revisions had been sought and no new PCI assessments had been prepared, any referral for action to cure those deficiencies would have to be made to the State, rather than to OSM. Here, new PCI assessments have been prepared by the State and they have been subjected to public comment. By failing to comment, as we stated previously, NRDC et al. waived any objection to their sufficiency.

Alluvial Valley Floor Determination

OSM, the State, and West Elk all argue that the improper stipulations regarding the AVF determination have also been cured by the permit revision and mining plan modification approvals. NRDC et al. contend the same relief outlined for the PCI assessment should be granted because, as with that assessment, they were denied an opportunity to comment at the Federal level on the adequacy of the submissions made to cure the deficiency.

In our earlier decision we stated that OSM's failure to require the applicant to satisfy 30 CFR 785.19(d) (1981) before issuing the permit, by allowing the applicant to submit the necessary information or establish that it was not required to do so, was error. NRDC v. OSM, 89 IBLA at 57, 91 I.D. at 416. The Board found that issuance of the permit had deprived the applicant of the opportunity to comply with the regulation and that OSM's stipulation Nos. 3 and 5 were apparently included to satisfy the regulation.

The basis for the argument that the deficiencies have been cured is subsequent actions by CMLRD in review of the applications for permit revisions. West Elk, the State, and OSM argue that CMLRD found that the operations would not materially damage the quality and quantity of water in surface and underground systems that supply the AVF, and, thus, the AVF would not be affected. The deficiency identified by the Board was the failure of OSM, prior to permit issuance, to allow the applicant to comply with the regulation or establish that compliance was not necessary because the AVF would not be affected. The State found, based on West Elk's permit revision application packages, that the AVF would not be affected. The State invited the public to comment on its proposed approvals, which included the AVF findings. NRDC et al. did not avail themselves of this opportunity. Thus, we find, for the same reasons discussed for the PCI assessment, that NRDC et al. waived any right to comment on the information supplied which resulted in the CMLRD's findings. NRDC et al. is not entitled to any relief on that basis.

Loadout Facility

We also found OSM had erred in issuing the permit without requiring plans for the loadout site sedimentation pond and by adding stipulation No. 23 to satisfy that requirement. Stipulation No. 23 of the OSM permit required the applicant to submit a sedimentation control plan for the loadout site prior to initiation of construction of the loadout facilities. The same stipulation appeared in the State permit as stipulation No. 2. The

plan was submitted to CMLRD and approved by it in March 1982 (West Elk Brief, Addendum 3). 14/

West Elk argues that under the circumstances no relief is required. It points out that approval occurred prior to construction, and there is no suggestion the plan did not fulfill the requirements. The State presents a similar argument. OSM, however, states that CMLRD did not submit its approval of the plan for public review and comment because CMLRD assumed the permit had been properly issued and public comment was unnecessary. OSM states that since the Board has held OSM should have required the plan prior to issuing the original permit, at this time it would be proper for the Board to direct CMLRD to solicit public comment on the approval in the absence of a showing that it had previously done so. OSM notes that loadout site activities should be allowed to continue during any public comment period. OSM contends: "This procedure would ensure effective public participation in the consideration of whether the CMLRD-approved sedimentation control plan cures the defect identified by the Board, while precluding an interruption in mining operations which would be unwarranted at this juncture" (OSM Brief at 7, footnote omitted). OSM characterizes the failure to require the plan as a "procedural error which can easily be cured in short order" (OSM Brief at 7).

14/ OSM represents that this approval by CMLRD was undertaken pursuant to "its cooperative agreement" (OSM Brief at 6). The cooperative agreement set forth at 30 CFR 906.30 is dated Sept. 27, 1982. Thus, approval by CMLRD could not have been pursuant to the cooperative agreement. The record does not indicate whether OSM participated in the approval or independently approved the plan.

NRDC et al. argue that they have been afforded no right at either the State or Federal level to comment on the "subsequent submission which supposedly corrected the deficiency concerning the load-out facility stipulation" (NRDC et al. Reply Brief at 13). NRDC et al. disagree with OSM, however, concerning the forum for entertaining comments. They state:

If OSM believes the materials which ARCO/West Elk previously submitted to satisfy the stipulations are adequate, it may submit those materials for public comment. If OSM chooses this course, as is likely, OSM must evaluate the public comment submitted and make an independent judgment on the adequacy of these materials based on that comment.

(NRDC et al. Brief at 28).

The error identified by the Board was of a technical nature. OSM failed to require the information prior to permit issuance, as required by regulation. However, both the State and OSM inserted stipulations in their respective permits requiring the submission of the plan prior to any construction, and the plan was submitted and approved by CMLRD before construction began. NRDC et al. complain they did not have the opportunity to comment on the adequacy of that plan, and West Elk admits that the public did not have the opportunity (West Elk Reply Brief at 11). West Elk points out, however, that "no one has ever suggested that anything is wrong with the pond" (West Elk Reply Brief at 11-12). Nothing in the record indicates otherwise. NRDC et al.'s only complaint was that the plan was submitted prior to permit issuance. Although the plan was approved in March 1982, NRDC

et al. never challenged that plan as inadequate in the hearing held in this case in May and June 1982 nor in any of the multitude of pleadings subsequently filed in this case.

The purpose of the regulation found by the Board to have been violated was to provide the regulatory authority with sufficient information to determine, for the loadout site, whether the applicant had an adequate plan for sediment control, and, as noted above, CMLRD approved the plan. However, should NRDC et al. believe that the present loadout site sedimentation control plan is inadequate, they shall have 30 days from receipt of this decision to request CMLRD to offer a comment period. CMLRD should then allow a comment period and handle any comments in accordance with its established procedures. Any request and ensuing comment period shall not result in the disruption of any of West Elk's activities at the mine site.

Attorneys' Fees and Expenses

NRDC et al. contend they are entitled to an award of reasonable attorneys' fees and expenses as a result of the Board's September 27, 1985, decision. They suggest the Board find they are entitled to an award pursuant to section 525(e), 30 U.S.C. § 1275(e) (1982), and establish a briefing schedule. In reply the State argues that this case has not furthered environmental concerns but detracted from them, and "[i]f attorneys fees are assessed they should be assessed against rather than for NRDC" (State Reply Brief at 4, emphasis in original). West Elk asserts the Board should not consider the

attorneys' fee issue until presented with a petition. OSM queries whether the question of attorneys' fees should be addressed at this time, but states it reserves the right to address the issue upon direction to do so by the Board.

We find it premature at this time to rule on entitlement to attorneys' fees and expenses. Any party to this case may file a petition for award of costs and expense in accordance with the procedures in 43 CFR 4.1290-4.1295. Such petition must be filed within 45 days of receipt of this decision.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Board finds that the deficiencies identified by the Board have been cured and that no relief is appropriate, except to the extent NRDC et al. may request within 30 days of receipt of this decision that CMLRD offer a comment period on the sedimentation control plan for the loadout facility.

Bruce R. Harris

Administrative Judge

I concur:

Gail M. Frazier

Administrative Judge

ADMINISTRATIVE JUDGE IRWIN DISSENTING:

The majority hold that, because NRDC "waived or acquiesced in waiver of" the time limitations for administrative review imposed by section 514(c), the Board is not limited to granting or denying the permit in whole or in part, but "may fashion relief which is appropriate in this case." See supra at 283. They do so, presumably, to avoid NRDC's argument that our finding a permit must be denied in part "leads to only one result-- cessation of mining." Id.

NRDC et al. argue:

Since no mining can lawfully occur without a permit, it follows that mining cannot continue where the Board or the regulatory authority denies the permit in part * * *. The basic contention of NRDC et al. can be expressed in a simple syllogism. The Act requires a permit to mine; no person is entitled to a permit if the person has not met all the requirements of the Act, therefore they cannot lawfully mine.

(Statement of Position filed Dec. 2, 1985, at 12-13).

The difficulty with this argument is that it ignores the language of section 514. Sections 514(a) and 514(b) provide that the regulatory authority may, respectively, "issue * * * [a] written finding * * * granting or denying the permit in whole or in part," and "notify the applicant * * * whether the application has been approved or disapproved in whole or in part." In those sections the "regulatory authority" is the Office of Surface

Mining Reclamation and Enforcement (OSM) or a state. In section 514(c) the regulatory authority, after holding an adjudicative hearing on the reasons for the final determination, shall "issue * * * [a] written decision * * * granting or denying the permit in whole or in part and stating the reasons therefor."

This language has been a part of the Act since it was first drafted. See, e.g., section 215, H.R. 11500, H.R. Rep. No. 1072, 93d Cong., 2d Sess. (1974); section 209, S. 425, S. Rep. No. 402, 93d Cong., 1st Sess. (1973). Indeed, in the original Senate bill the language appears immediately before the provision that "no permit will be issued unless the regulatory authority finds that * * * all requirements of this Act and the State or Federal Program have been complied with," thus indicating the drafters of the legislation found no apparent inconsistency in the language of these two provisions.

Thus, the question is not whether the parties insist on the time limits in section 514(c) or whether we are limited to granting or denying the permit in whole or in part--the language of the Act says we are--but what follows if we do deny it in part. It is true that section 502(a) provides that no person shall open a mine unless a permit has been obtained and section 510(b) provides that no permit shall be approved unless the application demonstrates and the regulatory authority finds in writing that all the requirements of the Act and the state or federal program have been complied with. It does not follow, however, that the Board must block or halt mining because OSM

improperly approved the application. If the permit may be granted or denied in part, as section 514(c) says, then whether mining must wait or cease depends on what terms of the permit are denied and whether they are so integrally related to mining that they must be granted before mining can proceed. This is a question that will have to be answered in each case.

In this case, therefore, the question is whether any of the deficiencies found by the Board in OSM's approval of the permit application are so central that the mine must remain closed until they are remedied. 1/ The answer must be "yes" because there has not yet been an assessment, by either OSM or the State of Colorado, of the probable cumulative impact of all anticipated mining in the area--including the life-of-the-mine area of the Mt. Gunnison No. 1 mine--on the hydrologic balance. 2/ Such an assessment is central to determining whether and how mining may proceed.

The majority also find it "premature at this time to rule on entitlement to attorneys' fees and expenses." See supra at 301. At the time of our decision on the merits, in September 1985, 43 CFR 4.1294(b) provided for the award of appropriate costs and expenses, including attorneys' fees, to any

1/ The Mt. Gunnison No. 1 mine is presently not in operation.

2/ The Colorado Mined Land Reclamation Divisions's (CMLRD's) "Proposed Decision and Findings of Compliance," dated June 14 and Aug. 26, 1985, for the revisions of the Mt. Gunnison No. 1 mine permit only assess the impacts on hydrology from mining during the 5-year permit term, not the life of the mine. See, e.g., June 14 Proposed Decision (OSM Exh. B) at 30-31, 34, 38-39, 43. The CMLRD finding that "an assessment of the probable cumulative impact of all anticipated mining in the general area on the hydrologic balance has been made" (id. at 46) must be evaluated with this understanding.

person from OSM "if the person initiates * * * any proceeding under the Act upon a finding that the person made a substantial contribution to a full and fair determination of the issues." Effective December 16, 1985, a condition was added that the initiating or participating person must be one "who prevails in whole or in part, achieving at least some degree of success on the merits." See 50 FR 47222, 47224 (Nov. 15, 1985); cf. Donald St. Clair, 84 IBLA 236, 92 I.D. 1 (1985). Whether the rule at the time of our decision on the merits applies, or the rule as subsequently amended, it is clear that NRDC et al. are entitled to an award. The only issue is how much it should be under the applicable standards. See Council of the Southern Mountains v. OSM, 3 IBSMA 44, 88 I.D. 394 (1981).

Will A. Irwin

Administrative Judge

